Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, Ohio.

In the Supreme Court of Ohio.

THE CINCINNATI SOUTHERN RAILROAD.

Argument of Henry Stanbery,

In favor of the Constitutionality of the Act providing for the Railway.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, Ohio.

In the Supreme Court of Ohio.

The City Solicitor

vs.

The City of Cincinnati, the City Auditor, and William Hooper, Miles Greenwood, Richard M. Bishop, Philip Heidelbach, and Edward A. Ferguson, Trustees of the Cincinnati Southern Railway.

ARGUMENT OF HENRY STANBERY.

When I was retained by the Trustees to argue this case, I supposed only one question was to be considered, viz: whether the act of the General Assembly, under the provisions of which this railway was provided for, was a constitutional enactment under the prohibitions contained in the sixth section of the eighth article of the present Constitution of Ohio.

I find, however, upon reading the brief of the opposite counsel, that other questions are also raised, and that other constitutional objections are made to the validity of the act.

Following the order in which these questions are presented in that brief, I will proceed to consider the first point so made, to wit: that so much of the act as vests in the Superior Court, or the Common Pleas, the appointment of the

five Trustees is unconstitutional, because the vesting of such power in the Court constitutes the judges of the Court public officers, and is an exercise of the appointing power by the General Assembly, forbidden by art. 2, sec. 8, of the Constitution, and because the office so devolved on the judges is an office of profit or trust, and as such forbidden by sec. 14, art. 2.

We see, therefore, that two sets of public officers, according to the plaintiffs, are created by this act; that is to say, the judges of the Superior Court, appointed by the Legislature, and the trustees appointed by the Court.

First, then, as to the judges: The power is given to them *as a Court*, not *eo nomine* as persons, nor even as individual *judges*, *virtute officii*. In that important particular the case is distinguished from *Attorney-General* v. *Kennon*. It is claimed, on the other side, that it is all the same as if this power had been given to the individual members of the Court by name, and not as a Court, or in their judicial character. But it is not the same, for when it is given to the Court, there can be no question about the creation of any new officers or new office; but the only question would be as to the capacity of the existing officers to exercise the new power so given—a very different question from that which we are here considering.

This leads at once to the question whether the appointment of these Trustees by the Superior Court is the exercise of judicial or political power.

If it is an exercise of judicial power, the plaintiffs admit they have no case, for it is said in the brief of Mr. Kittredge: "I have no argument to restrict the power of the Legislature to enlarge the jurisdiction of a judicial tribunal, to confer upon it enlarged powers and duties that are judicial in

their character. But I submit that the power conferred in this case is not judicial, but is political in its nature."

Let us, for the sake of argument, take it to be in the nature of a political power—that is, a power to appoint a public officer—where do we find a constitutional prohibition against vesting in this Court the power to appoint these Trustees?

The Superior Court is the creature of the General Assembly, made under the authority of the Constitution, to exercise such jurisdiction as the General Assembly might devolve upon it, with only this limitation: that it must be "inferior to the Supreme Court."

These Trustees are new officers, not provided for in the Constitution, but by the General Assembly, under the constitutional authority to make their appointment in such manner as it deems best.

Now, the General Assembly has not undertaken to appoint these Trustees itself—another important particular which distinguishes this case from *Attorney-General* v. *Kennon*—but has devolved that duty on the Court.

It appears that the Superior Court did not doubt its authority to appoint these Trustees, but did make the appointment; and this presents the question in a very different aspect than if the Court had refused to appoint, on the ground that the Legislature could not compel its exercise. The case of *The State* v. *Gazlay*, 5 Ohio Reports, 14, is directly in point. A law of the State passed February 7, 1825 (Statutes, vol. 23, p. 48), made it the duty of the Court of Common Pleas to assess annually a tax of not less than $5 nor more than $50 on the practicing lawyers of the State.

The constitutionality of this act was made a point in the above case, by Gazlay, upon whom the Court had assessed a

tax. The Court say, page 22: "The manner of assessing the tax does not, in our opinion, render it illegal. If the Common Pleas had declined the assessment as a service beyond their judicial duties, as the judges of the judicial ('Federal') Courts declined acting under the act conferring pensions, it would be a grave question whether the duty could have been executed. But the judges have assessed the tax, and a privilege which they do not claim can not avail the defendant."

Certainly the assessment of a tax for revenue purposes is more clearly the exercise of political power than the appointment of our Trustees; but as we are just now, *ex gratia*, proceeding on the basis that the action of the Superior Court in appointing the Trustees was the exercise of political rather than judicial power, yet as the appointment has been made, it can not now be questioned unless this Court is prepared to overrule the Gazlay case and question the action of the Federal Judges in performing political duties under the pension laws. If it be said that the Federal Judges, unlike the Superior Court Judges, performed a duty devolved upon them as a Court, by acting in their individual capacities, the answer is that if such a duty devolved upon a court can be performed by the judges in their individual character, then, as all the Judges of the Superior Court concurred in the appointment of the Trustees, the consequence is that the power given to them was well exercised, for the very persons capable of exercising the power did, in fact, exercise it, and the erroneous capacity in which they have acted does not vitiate the appointment.

So much as to the point that if the appointment of

these Trustees was an exercise of political power, it must, notwithstanding, be considered as well made.

Before I leave the point it is well to bring before the Court other acts passed by the Legislature under the present Constitution, which confer powers on the Courts more akin to political power than the act in question.

In the appointment of *Directors of Work-house*, a penal institution, Swan & Sayler, 868; *of Auctioneers*, S. &. S. 24; *of Examiners of County Commissioners' Reports*, S. & S. 88; *of County Commissioners*, S. & C. 244; *of School Examiners*, S. & S. 706; *of Commissioners for the Improvement of the Cuyahoga river*, 58 St. 177; *of Commissioners of Costs and Fees, with a salary of* $1,500, *and term of office for three years*, 68 Stat. 58; *of Trustees for Schools specially endowed*, S. & C. 1383; *of Trustees for Benevolent Female Associations*, S. & S. 51; *of Inspectors of Tobacco*, S. & C. 733; *of Inspectors of Spirits, Linseed Oil, Lard Oil, Coal Oil, Beef, Pork, Lard, Butter, and Pot and Pearl Ashes*, S. & S. 401; *of Inspectors of Illuminating Oils*, S. & S. 402; *of Inspectors of Alcoholic Liquors*, S. & C. 729.

It will be seen from the acts above referred to—all passed since the present Constitution took effect—how common has been the legislative usage of conferring this power of appointment on the Courts: on the Common Pleas, the Superior Courts, and the Probate Courts. It is true that in some of the instances the Trustees, or other officers so appointed, are connected with the administration of subjects matter which come within the purview of charities, in the modern and enlarged scope of such objects, whether established by public authority or specially endowed by individuals; but the most numerous instances are those which relate to matters of mere police. So, too, it will be seen

that the various officers so appointed have, in some instances, a fixed term of office and a fixed salary, while others have no fixed term and no compensation, or such compensation as may be allowed by the Courts. And again, that in some instances the appointing power is conferred on the courts and some other public officers, to be exercised as a joint authority.

I am not aware of any case in which this Court has questioned the constitutional power of the Legislature to devolve such duties on the Courts, although cases in which the objection might have been raised, have been before the Court. *Smith* v. *Kibbe*, 9 Ohio St. Rep. 563, was such a case. It was upon the act cited above, for the appointment by the Probate Court of inspectors of alcoholic liquors, S. & C. 729. A manufacturer of whisky in Licking county had sold whisky without inspection, and upon his suit to recover the price, the defense was that it had not been inspected, and that such sale was forbidden by law. The answer was that the Probate Court of Licking county had neglected to appoint an inspector, and upon that ground this Court overruled the defense.

Not an intimation was given that the provision for appointing an inspector for the county was void or unconstitutional. On the contrary, the Court held that as the appointment could only be made for Licking county, by an inspector appointed by the Court for that county, and as the local Court had neglected to make the appointment, and the whisky was proved to be unadulterated, the sale was valid. It appears clearly enough that if such inspector had been appointed, the sale, without inspection, would have been invalid. The Court put the case whether the manufacturer could have compelled the Probate Judge, by *mandamus*, to

make an appointment, and say that this is at least questionable. This doubt is clearly not founded upon any idea of the unconstitutionality of the duty, but rather of the performance of a function that rests in a measure upon the exercise of a discretion in the performance of a duty to find and appoint a "competent chemist" to act as inspector. However that may be, the case shows that the defense would not have availed if the Court had appointed an inspector, as happens to be the case with our Trustees.

Surely such continued usage, by successive legislative bodies, running through a period of twenty years, involving great interests, and so diversified as to affect daily transactions to an unlimited amount, is not to be lightly considered. As a fixed construction by the legislative department of its own powers, it is entitled to great weight; and in view of the consequences which must result from holding it invalid, this Court must pause before it announces such a decision. We all recollect that the old Court in Bank was of opinion that the granting of divorces by act of the Legislature was an exercise of strictly judicial power, and as such contrary to the old Constitution; but in view of the legislative usage and the consequences which would result, that Court yielded its deliberate opinion—mark it, not its "reasonable doubts or impressions"—and decided that such a divorce was valid. So, too, the practice of the various Courts upon whom such duties have been devolved is entitled to consideration. Not one of them, so far as I can learn, has ever refused to act upon any such idea as that the duty so imposed was contrary to the Constitution, but they have uniformly recognized it as a duty to be performed.

THE APPOINTMENT WAS A JUDICIAL ACT.

I have hitherto considered the validity of the appointment of these Trustees upon the supposition that it was political in its nature; but will now proceed to consider its true character, which I claim to be judicial.

First of all, it was made by a Court in a case depending in the Court. The second section of the act provides that after the popular vote is given in favor of the railway, a petition shall be filed by the City Solicitor in the Superior Court, praying that the judges will appoint the five trustees, and that it shall be the duty of the judges to make the appointment and enter the same on the minutes of the Court. The Court is also to direct a bond, with sufficient securities, to be approved by the Court, to be given by the trustees. And by the 6th section the trustees, and the management of their trust, are brought under the jurisdiction of the Court upon a petition to be filed by the City Solicitor, or other person interested in the trust, charging such mismanagement, and power is given to the Court to remove and reappoint trustees. Here then we have a Court, a case pending, and proceedings and orders to go upon its records. In other words, we have all the customary forms and modes in which judicial action is exercised.

Next, we have a subject-matter for judicial action—that is to say, the appointment of trustees to manage a fund, raised by the people of Cincinnati, and for the construction of a great road, deemed by them essential to the interests of the city. It is a fund to be kept distinct from the general funds of the city; never to be touched for other corporate uses, and devoted by the citizens only to this public use and benefit. It was a wise provision, therefore, to place this

separate fund in separate custody, rather in the hands of special and approved custodians, whose duty it is made to manage it alone, than in the hands of city officials, created for ordinary corporate purposes, and fully employed in ordinary corporate duties; to surround it with all the safeguards of a special trust, in the selection of competent and responsible agents, whose faithfulness is secured by special bonds, rather than city officers, not selected for such service, with no other guards than their official bonds to secure their general good behavior. Certainly no one can deny that the Superior Court was a safer tribunal to select and appoint these trustees than a city council. The objection is not on the ground of safety but of legality.

Now, then, I say it was competent for the Legislature to declare this fund a trust fund in the strictest sense of that term, and, as such, to bring it within the range of well established judicial cognizance. And this is undeniable if hitherto such a fund had not been stamped with the character of a trust or brought under the supervision of a Court.

But it is clear that this fund is in the nature of a public charity, and as such altogether fit for judicial cognizance. I use the word charity in its comprehensive meaning, as established by judicial decisions; not as confined to the distribution of alms, or aid to the poor, but as embracing a subject-matter devoted to a lawful public use.

In the case of *The McIntire Poor School*, 9 Ohio Reports, 287, the Court say, "We would not unnecessarily enter into the much disputed and greatly perplexed inquiry of the extent of chancery jurisdiction over charities independent of the statute" (43 Elizabeth.) "But one of the earliest elements of every social community upon its lawgivers, at the dawn of its civilization, is adequate protection to its prop-

erty and institutions, which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture and its sepulchres, and in a proper case the Courts of our State might be driven into the recognition of some principle analogous to that contained in the statute of Elizabeth, as a necessary element of our jurisprudence. But without reference to these considerations, where a trust is plainly defined, and a trustee exist, capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it by its own inherent authority, not derived from the statute nor resulting from its functions as *parens patria.*"

I am now proceeding upon the assumption that this fund is devoted to a lawful public use, that is to say, to a use within the corporate capacity of the city and its municipal purposes, and therefore a proper subject to be attained by municipal taxation.

Taking it, then, as granted that this fund is devoted to a lawful public use, is it such a public use as in the language of our Supreme Court makes "a proper case" for judicial cognizance?

It is a fund devoted by the people of the city to a railway—a well-established public use—to be built and owned by the city, and declared by the Legislature and the people of the city to be essential to the interests of the city and its citizens.

Suppose an individual had devised the fund to such a use, can any one doubt that its administration would make "a proper case" for the exercise of judicial power? Can any one doubt that if no trustee had been designated by the testator, a Court might, upon its inherent jurisdiction and without legislative authority, appoint a trustee rather than have the trust, or use, fail? Does it alter the case that the

people of Cincinnati have raised this fund and devoted it to this public use? Is it not just as fully entitled to judicial protection, that it is voluntarily contributed by themselves and from their own money, as if it were provided for them by the bounty of an individual?

Bryant, etc. v. *McCandless*, 7 Ohio Rep., pt. 2, p. 135, settles this question. In that case an association called the New England Land Company, consisting of 109 persons, purchased a tract of land in Licking county, and in their partition deed a parcel of fifty acres of the tract "are given by said proprietors, to be a perpetual fund for the support of the ministration of the Gospel *on the premises of the company.*" There was no grantee of this tract. The Court say, "It is the received and settled law that a dedication for public, pious, or charitable uses, requires no donee to give it effect. It is an equally well-settled principle in chancery, that a trust shall never fail for want of a trustee, but that the necessary appointment may be made by the Court."

Now it appears from this case, that the subject-matter, or fund, was contributed by the owners of this land, and devoted to a use for their own benefit on their own premises. It was nevertheless held to be such a public use as constituted *a trust*, entitled to judicial cognizance and enforcement.

I will now proceed to argue the main question in the case, that is, whether the act providing for the railway falls within the prohibitions contained in section 6, article 8, of the Constitution.

The section is in these words:

"The General Assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for or loan its credit to, or in aid of any such company, corporation or association."

This is a limitation upon the grant to the General Assembly of the legislative powers of the State contained in section 1, article 2.

The grant of power is universal. The act in question is an exercise of this power, and must therefore prevail, unless it comes within some one of the exceptions to this general grant.

No exception or limitation upon this power is relied upon to prohibit this act, save only the above section.

Nevertheless, although it is not insisted upon by the plaintiffs, it may be well to consider another prohibition—that is, this clause of section 26, article 2: "Nor shall any act, except such as relates to public schools, be passed to *take effect* upon the approval of any other authority than the General Assembly, except as otherwise provided in this Constitution."

The first section of the act does provide that no money shall be borrowed to construct the road, until the question of providing the railway shall be submitted to a popular vote, and a majority of the electors shall decide in favor of the line.

There is no provision in the act which declares that it shall not take effect until it is approved of by the popular vote. As no future day was fixed in the act for its taking effect, it became to all intents a law when it was passed.

This constitutional provision only declares a principle which was fully, though not expressly, established under the old Constitution; and it is this, that legislative powers can only be exercised by the Legislature, and can not be delegated. There has been no such delegation of the legislative power in this instance—no provision that before the act should take effect it should be left to the people to decide whether it should become a law or not. This is not only clear enough from the language of this constitutional provision, but also from the excepted cases provided for in other sections.

For instance, in section 7, article 13, which provides that, "No act of the General Assembly, authorizing associations with banking powers, shall take effect until it shall be submitted to the people at the general election next succeeding the passage thereof, and be approved by a majority of all the electors voting at such election."

It is the act itself in its entirety that is to be submitted, not some one of its provisions.

Suppose a similar provision had been made as to such an act as this. It would have been in these words: "No act of the General Assembly authorizing cities to provide for municipal objects, shall take effect until submitted to the people, and approved by a majority of all the electors voting at such election."

Now by this act the only question submitted to the people is as to providing the particular railway designated by a vote of the council. The act does not designate the railway any further than that one of its termini must be the city. That power of designation is left to the council. Is that, too, a delegation of legislative powers? So, too, whether any railway is to be provided, is left to the discre-

tion of the council, for the act is not mandatory. The council may or may not pass the resolution to provide the railway. Who will say that they exercise legislative power in the exercise of this discretion? But this power or discretion left to the council is precisely the same as that left to the people. The same question submitted to the council is submitted to the people, and if it is not legislation as to one, it is not legislation as to the other. The constitutional prohibition is against submitting the act to any other authority than the Legislature, whether it be a council of a city, or the people of a city.

But what seems to me conclusive upon this point is this. That this act is a continuing authority. A council may delay indefinitely to take action under the law, or it may act at once. It may pass a resolution this year that it is not then essential to the interests of the city to provide a railway, and next year pass a resolution that it is essential.

So, too, the people may vote against the particular line specified in the resolution of the council, because they do not want that particular line, or because they object to the amount of debt to be incurred in its construction.

The power given is not exhausted by the first resolution of the council, or the first vote of the people.

The council may afterward provide for another line, which the people may approve. Meantime the act remains in force. Nothing like this can be said as to *an act* which is to *take effect* only upon a popular vote.

It is the vote that is the test whether *the act* becomes a law or not—and if the vote is against it, the decision is final and the act ceases to have a further operation—precisely as the acts of the Roman Senate became null upon the absolute veto of the tribune of the people. But,

as I have said, when the people vote against a special line of railway they do not vote against *the act* itself. They may have a better line, under the act, than the one provided by the council. It is the council that provides for the special line, not the act; therefore to vote against that special line is in no sense to be considered as a vote against any line that may be provided—and consequently not against the act which gives a general authority under which an acceptable line may be provided.

I do not deem it necessary to cite the instances in which laws containing such provisions as are found in this act, have been held to be no delegation of legislative power. It must suffice to refer to the case of the *C. W. & Z. R. R.* v. *Commissioners of Clinton County*, 1 Ohio St. Rep. 86, directly in point and decided by an unanimous bench.

Now although the constitution of 1802 then before the Court contained no such express prohibition as the present Constitution, yet the Court find the same prohibition in it. They say, referring to the old Constitution, that "the General Assembly can not surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body, is a proposition too clear for argument, and is denied by no one."

Then, referring to a law submitting the question of subscribing for stock in a railway to a popular vote, the Court hold that such a provision is in no sense a delegation of legislative power, and does not submit the law itself to popular action.

In the later case of *Cass* v. *Dillon*, 2 Ohio St. Rep. 607, this Court gives a construction to this section of the present Constitution, in reference to a law of the same character as the one under consideration, but passed prior to it. It

is said that even if a retrospective operation were given to this section, "it does not touch the law in question, which took effect as soon as passed, and derived none of its validity from a vote of the people." Pp. 616, 617.

We are therefore brought to the consideration of the 6th section of the 8th article as the only restriction of the legislative power, which can be claimed to apply to such an exercise of that power as appears in the act in question.

Let us look at it under the guidance of well-established canons of construction.

FIRST, THE WORDS THEMSELVES.

These are first in weight and control all other canons—in fact displace all others—for where the construction is clear upon the words, and the intention is well enough expressed in the language, it is not allowable to resort to the other canons of construction—their true office being only to arrive at a meaning not sufficiently conveyed by the language used.

The rule that a construction may sometimes be against the very letter, does not contravene the general rule—for that at last is a construction allowing other words used in the law to control the particular word or phrase, which by construction is changed or wholly rejected. It is at last a construction according to the words—that is, according to all the words—as often happens in construing "or" to mean "and"—or "may" to mean "must"—in order to carry out an intention clearly enough expressed by the other language of the law.

What are the words to be construed here? They are as follows:

"The General Assembly shall never authorize any county,

city, town or township, by a vote of the citizens or otherwise, to beeome a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or to loan its credit to, or in aid of any such company, corporation, or association."

Observe that this section is found in a written constitution—and every word has been weighed with great deliberation, and been subjected to the criticism of a large and intelligent convention, embracing representatives of the legal profession—eminent judges and lawyers, skilled in the use of language and accustomed to its construction.

There is not an ambiguous or repugnant word to be found in the section, and if, as we say, the intention was to prohibit a municipal corporation from becoming a stockholder in, or lending its money, or its credit, or giving its aid, to such companies, corporations, or associations, no fitter language could have been used to make *that* intention manifest.

Now if I comprehend the opposite counsel, they do not claim that this special prohibition against such use of municipal money or credit is not well expressed. They agree that the intention to declare that special prohibition at least, is manifest from the language used. Their argument is that whilst this one intention is expressly provided for by the very words used, there is another and totally different intention, which may be gathered from the words, not expressed but necessarily implied—and that is that the municipality shall never be authorized to expend its money for its own purposes, or to furnish aid to itself. To this absurd length we are driven by this construction, for it will not escape notice that this expressed prohibition is not confined to railways or railway corporations. It em-

braces all corporations and associations that have stock to sell, or which require the use of money, and all subjects matter, whether they belong to municipal purposes or not. It follows inevitably, if their construction prevails, that the intention of this section was, not only to prohibit a city from lending its money to a company incorporated to furnish the city with gas, but as well from using its own money to light the city itself, where there happens to be no company, or one not able to carry out the public object. It leaves the city powerless, though with abundant means to furnish the most necessary municipal wants. It leaves the city at the mercy of corporations in providing for such corporate uses as a supply of light or water. We see, then, from the language of this section, no room to imply an intention to extend its prohibitions against the use of municipal funds by a city for its own corporate purposes. Next let us look at the language of other sections of the Constitution, to see how far other words so used throw light upon the words used in this 6th section, and in what manner, when the intention is to prohibit a municipality the use of its own funds for its own corporate purposes, by its own agencies, that intention is expressed.

Look, then, first at the 4th section of this 8th article. "The credit of the State shall not in any manner be given or loaned to, or in aid of, any individual association, or corporation whatever. Nor shall the State ever hereafter become a joint owner or stockholder in any company or association, in this State or elsewhere, formed for any purpose whatever."

The language here used is almost identical with that used in the 6th section, and both must have the same con-

struction. They stand in juxtaposition—struck off at one heat—uttered, we may say, *uno flatu.*

Did the Convention intend by this section to forbid the State from using the money or credit of the State for State purposes? Is that the way which the Convention took to forbid the State from expending its own money, by its own agencies, for any purpose, or even for public works or public improvements?

Certainly not. For when that was the intention, the Convention used language which expressed *that* intention as clearly as language could express any intention. The constructing of railroads and other public improvements by the State itself might involve the creation of debt; but by the 1st and 2d sections of this same article, the subject-matter for which debts may be created by the State are specially enumerated, and such improvements are not within the enumerated subjects. Again, by section 6, article 12, it is provided that "the State shall never contract any debt for purposes of internal improvement."

It may be claimed in this case, as it was claimed in the case of *Cass* v. *Dillon*, 2 Ohio St. 614, that these limitations upon the State must be held to apply also to the various civil subdivisions of the State, but that argument was answered by this Court in that case, as follows: "We do not think so. The natural and obvious meaning of these several sections applies their limitations to the State alone, and n t to her subdivisions."

We say, then, that according to the language used in the 6th section, and in other sections of the Constitution *in pari materia*, the construction is clear of doubt, and that there is no foundation to imply a prohibition of the application by

a city of its own funds or credit, to its own corporate purposes, by its own agencies.

As I have said, where the intention is clearly expressed from the language used, we are not required to apply other tests or rules to find the intention.

Suppose we do resort to other tests. Take, for instance, that which relates to *the mischief* to be provided against. Pray what was the mischief? It was the mixing up the municipal funds with private funds and private enterprises, in subscriptions to the stock, and loans of money and credit to private corporations and associations, for the construction of railroads, turnpikes, and canals. Look at the proceedings of the Constitutional Convention, and there you will find the formidable array of private corporations to which such aid had been given. There was *the mischief*, and this 6th section was the *remedy*.

Again, look at the action of that Convention upon this subject. This 6th section was reported by a committee to the Convention in the early part of its session, Vol. I., p. 292, and the section, as reported, became a part of the constitution, with one or two merely verbal amendments.

During the long discussion to which it gave rise, there were two amendments offered.

One by Mr. Groesbeck, in these words, to be added to the section: "Nor shall any county, city, etc., for any purpose, contract debts, which shall in the aggregate exceed three per cent. of the amount of its taxable property." Rejected by a vote of 66 to 22. Vol. II., p. 312.

Another by Mr. Cutler, still more to the point, by adding these words: "No tax shall hereafter be levied by the authorities of any county, city, or township, for the con-

struction or improvement of any bridge, road, street, or highway." Rejected unanimously. Vol. II., pp. 109, 110.

It seems to me that there is no doubt as to the constitutionality of the act, even if we construe the act and the 6th section as if no constitutional question were involved. But when there is a question of the violation of constitutional law by an act of the Legislature, a Court must see its way very clear. No mere doubt—not even reasonable doubt—is then allowed to prevail. No inclination of opinion will suffice. Nothing short of a conviction, clear of doubt, will authorize a Court to pronounce the law void.

Another ground taken by the counsel of the plaintiffs is, that the five trustees are made a corporation by this act, within the prohibition of the sixth section. I shall not waste much time on this point; for whether we call the board a corporation, or, more near to the mark, a *quasi corporation*, it is too evident to require argument it is not the sort of corporation named in that section. We must understand the term as used in this section as applied to the subject-matter. It refers alone to corporations or associations, private as to property and ownership, in which the city may take stock, or to which it may lend its credit or money; whereas, this Board of Trustees owns no private property or stock representing such property, but is simply the managing element of public property belonging to the city. The city funds and the city credit are not to be loaned to any other corporation or association, but by this act are to be used by the city itself, through its own agencies, in aid of a public work to be constructed by itself, and to be owned exclusively by itself.

It is argued that as the city is only one terminus of a line extending beyond the corporate limits, and beyond the territorial limits of the State, it is not such a municipal purpose as comes within the legal capacity of the city to construct, or for which a tax can be levied upon the property of the citizens.

The authorities cited, in the opinion of the Superior Court upon this point, and in the opinion of this Court in the *C. W. & Z. R. R.*, 1 Ohio St. Rep. 77, and the cases there cited, would seem to dispel all doubt, and to render further argument unnecessary.

The Legislature has decided that a railway which has one terminus in the city is a corporate purpose, and the people of the city have decided that this road is essential to their interests. So, too, the Legislature has decided not only that it is a corporate purpose, but also that the citizens may be taxed to accomplish that purpose. Observe that the legislative grant is not for a road anywhere, but for a road that must have a terminus in a city of the first class, having a population over one hundred and fifty thousand, and not for taxation to any amount, but with a fixed limit.

This matter of municipal purpose and municipal taxation has been settled as to this road by the proper authority.

But it is said that, admitting the power of the Legis lature to declare what shall be a corporate use or a fit subject for municipal taxation, such power may be abused to such an extent as to justify the interference of the judiciary.

What is the abuse of these powers by this law? Is it as to an object in which the city has no interest, and

from which it can derive no benefit, or even which is unusual? Surely this very object has been too well upheld by the Courts as a legitimate municipal purpose to be now questioned. Or is it an abuse of the power of local or city taxation, and that undoubtedly is the most important matter, for there is the greatest danger of abuse. In other words, is the amount of tax so excessive as to be beyond all the benefits likely to arise to the city?

Now, what authority, legislative or judicial, has been designated by the Constitution to guard against that abuse? The sixth section of the thirteenth article answers the question: "The General Assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." The duty has been performed in this case by the very authority provided by the Constitution.

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